

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 03-0321
SALES/USE TAX
For Year 2000**

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ISSUES

I. Sales/Use Tax – Like kind exchange

Authority: IC 6-2.5-1-5(b); IC 6-2.5-1-6; 45 IAC 2.2-1-1(l).

Taxpayer protests the imposition of gross retail tax on a transaction claimed to be a like kind exchange.

II. Tax Administration – Ten Percent (10%) Negligence Penalty

Authority: IC 6-8.1-10-2.1; 45 IAC 15-11-2 (b).

The taxpayer protests the imposition of the ten percent (10%) negligence penalty that resulted primarily from the taxpayer's failure to collect Indiana sales tax and having outdated exemption certificates.

STATEMENT OF FACTS

Taxpayer sells and rents construction and mining equipment, including trailers to haul construction equipment. They also service and repair the equipment and sell related parts from all locations. Several sales are under rent purchase options where the rental customer may opt to purchase the equipment.

In June 2000, taxpayer entered into a cash sales contract in which it agreed to sell to a third party a custom-made crane. Part of the agreement contemplated the trade-in of similar construction equipment. Taxpayer contends that it is this transaction that is exempt from gross retail tax as a like kind exchange.

I. Sales/Use Tax – Like kind exchange

DISCUSSION

Taxpayer contends that when it entered into the transaction in question, it did so with the contemplation that a like kind exchange would take place. Like kind exchanges are exempt from gross retail tax under IC 6-2.5-1-5(b), which reads in relevant part:

"Gross retail income" does not include that part of the gross receipts attributable to:
(1) the value of any tangible personal property received in a like kind exchange in the retail transaction, if the value of the property given in exchange is separately stated on the invoice, bill of sale, or similar document given to the purchaser.

Like kind exchanges are defined in IC 6-2.5-1-6:

"Like kind exchange" means the reciprocal exchange of personal property between two (2) persons, when:

- (1) the property exchanged is of the same kind or character, regardless of grade or quality; and
- (2) the persons exchanging the property both own the property prior to the exchange.

Indiana regulations take the requirements one step further. 45 IAC 2.2-1-1(l) requires that "(an) exchange agreement must specify the definite units or quantity of property to be exchanged." In other words, it must be known at the time of the transaction what property is being exchanged for what property. Mere contemplation is not enough.

Taxpayer cites to certain concerns that made it difficult, if not impossible, for the taxpayer or the third party to definitely establish at the time of the contract what would be the traded-in or exchanged item. These concerns include the difficulty in valuating the third party's exchanges, the unique and specialized quality of the crane taxpayer was selling, and the unexpected early availability of the crane.

The regulations make it clear, however, that such concerns are not to be given consideration.

Taxpayer admittedly did not know the exact details of the exchange at the time of the sales contract. The terms of the contract itself illustrate this point. It reads, in part:

Other: Trade-Ins: To be determined at future date and 5% Indiana Sales Tax to be charged on difference (sic) price.

Because the definite units or quantity of property to be exchanged was not specified in the sales contract as required by 45 IAC 2.2-1-1(l), taxpayer's transaction cannot be classified as a like kind exchange, exempt from gross retail tax under IC 6-2.5-1-5(b).

FINDINGS

The taxpayer is respectfully denied.

II. Tax Administration – Ten Percent (10%) Negligence Penalty

DISCUSSION

The taxpayer protests the imposition of the ten percent (10%) negligence penalty pursuant to IC 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2 (b) clarifies the standard for the imposition of the negligence penalty as follows:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to reach and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

Taxpayer admits that it incorrectly assessed Kentucky sales tax when Indiana sales tax would have been appropriate. However, taxpayer claims that these mistakes were innocent and not part of any scheme to avoid paying tax to Indiana.

Taxpayer further admits that a portion of the assessment was due to the fact that taxpayer held outdated exemption certificates for several customers. However, taxpayer contends that penalties should be waived because certificates, albeit outdated, were available and because procedures have been put into place to prevent future problems.

It is the taxpayer's responsibility to correctly assess and remit taxes. Reasonable care on the part of the taxpayer would have included maintaining updated exemption certificates. Failure to update these certificates is proof of taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Also, subsequent remedial measures provide no evidence that a taxpayer is not negligent

FINDINGS

The taxpayer is respectfully denied.

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